CONSUMER FINANCIAL SERVICES LITIGATION – THE CHANGING LANDSCAPE

Introduction

At a recent presentation given by members of the The California State Bar Financial Institutions Committee at the Annual Meeting in Anaheim, California, a panel of prominent consumer financial services attorneys, including well-known litigation counsel, met and discussed current consumer litigation issues. Consumer financial services litigation continues to evolve – lending institutions face not only a weaker economy, impacting income projections, but also a veritable onslaught of new theories of liability. This paper reports on some of these cases handed down from California courts, other state courts, and federal courts involving consumer financial services litigation.

California Business & Professions Code § 17200 Claims

Plaintiffs' § 17200 Claims May be Predicated Upon Violation of Federal Law and Maintained in State Court

Fardella v. Downey Savings & Loan Association, 2001 U.S. Dist. LEXIS 6037 (N.D. Cal. May 9, 2001). The U.S. District Court remanded this broker's fee case to the Alameda County Superior Court, where it had been originally filed before being removed to U.S. District Court. The Plaintiffs allege that the mortgage broker orally represented that he had arranged the *lowest* available prevailing interest rate as of the date the loan was arranged. The Fardellas obtained a real estate loan for $65,000 to refinance their residence. When the loan was closed, Downey Savings and Loan Association paid the broker a rebate out of the loan proceeds as payment for securing the loan at an "above par" interest rate. This disparity in the broker's representation and the interest rate on the loan would be a Truth in Lending Act ("TILA") violation if the broker's rebate was not included in the borrower's cost of credit as a finance charge, and if it constituted an unlawful rebate having no relationship to the actual value of the services performed, a violation of the Section 8 of the Real Estate Settlement and Procedures Act ("RESPA"), both federal law claims.

Plaintiff's complaint, however, alleged the following state law claims: (1) unfair competition under Business & Professions Code Section 17200; (2) false advertising under Business & Professions Code § 17500; (3) common law conversion; and (4) common law fraud.

The opinion offers a discussion of three possible grounds for federal question jurisdiction: (1) federal law creates at least one of the causes of action; (2) the complaint "artfully pleads" a federal claim as a state claim; and (3) the right to relief depends necessarily on the resolution of a substantial question of federal law. Even though plaintiff's unfair competition claim depends upon establishing a violation of the RESPA and the TILA, "the invocation of federal law as a basis for establishing an element of a state law cause of action does not confer federal question jurisdiction when the plaintiff also invokes a state constitutional provision or a state statute that can and does serve the same purpose." (*citing Rains v. Criterion*, 80 F.3d 339, 345 (9th Cir. 1996)).

Furthermore, the claims brought under California Business & Professions Code § 17200 are in the disjunctive, that is, "unfair competition" includes any "unlawful, unfair or fraudulent business act or practice." A practice may be prohibited as unfair, even if not unlawful, and vice versa. *(citing Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.,* 20 Cal. 4th 163, 180, 973 P.2d 527 (1999)). In a bit of nifty reasoning, the Court determined that the state law claims may survive in state court even where the claims rest on establishing a federal violation. First, Plaintiffs can prevail by showing that the rebate is an unfair, rather than unlawful, business practice since California courts have defined an "unfair business practice" as one that offends an established public policy, or one that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers (citations omitted). An alternative definition requires courts to weigh the utility of a defendant's conduct against the gravity of the harm to the alleged victim. Defendants' defense that an act cannot be unfair if it is affirmatively permitted by law goes to the existence of a federal defense – not an essential element of Plaintiff's claim supporting federal question jurisdiction. Also, the violation of a federal standard does not necessarily raise a substantial question of federal law upholding the removal of the state law claims to a federal forum.

Schwartz v. Visa International Corp., 2001 U.S. Dist. LEXIS 105 (N.D. Cal., Jan. 9, 2001). Adam Schwartz sued Visa and MasterCard under Cal. Bus. & Prof. Code § 17200, seeking an injunction and return of $700 million currency conversion fees collected from U.S. consumers who used their credit cards in foreign countries. Defendants had removed the action to federal court based on the plaintiff having raised federal claims in his brief opposing a motion for judgment on the pleadings in state court. The U. S. District Court found that the plaintiff has not raised independent federal claims, and remanded the act to state court.

The first cause of action in plaintiff's complaint alleged unfair business practices based on defendants' imposition of unconscionable "currency conversion fees," without disclosure, against cardholders making purchases in foreign countries. The second cause of action alleged unlawful business practices based on the same acts, specifying that these acts are violations of various state and federal laws, including the federal Truth in Lending Act. Plaintiff's complaint did not allege separate causes of action under the TILA or any other federal laws. Visa and MasterCard tried to use plaintiff's briefs to persuade the court that plaintiff's intended to argue violations of federal law, but the court thought it obvious that the references to federal law were to show that a breach of federally mandated disclosure duties constitute unlawful business practices under section 17200. Although probably unnecessary, the court pointed out that "a section 17200 action 'to redress an unlawful business practice "borrows" violations of other laws and treats these violations . . . as unlawful practices independently actionable under section 17200 *et seq.* and subject to the distinct remedies provided hereunder.'" (citations omitted)

Court Allows Unfair Business Act Claim to Proceed Against Bank Based on Tort of Another

Rosales v. Citibank, F.S.B., 133 F. Supp. 2d 1177 (N.D. Cal. 2001). A depositor's bank account was wrongfully debited by the use of unauthorized withdrawals at ATMs located in a another city. Citibank declined to reimburse Mr. Rosales' account because his account access card had not been out of his possession. The complaint alleged violations of the federal Electronic Funds Transfer Act, and California's Unfair Business Practices Act. The Court stated that the money in the account belonged to Mr. Rosales, that the complaint alleged that Citibank allowed an unauthorized person to withdraw money from that account, and refused to strike the complaint, stating that "there is no reason why Citibank could not be ordered to pay an amount of money to

Mr. Rosales as restitution for the wrongfully withdrawn funds. The reasoning is this: If the Electronic Funds Transfer Act required Citibank to credit the account the amount of the unauthorized withdrawals, and Citibank failed to do so, then Citibank possesses money belonging to Mr. Rosales in violation of the law, and hence, by means of "unfair competition." Section 17203 of the Business & Professions Code, among other things, authorizes a court to make any order "as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." Further, based on the power of section 17200. the court is permitting the case to proceed on behalf of members of the general public who had unauthorized amounts withdrawn from their accounts when their access cards were in their possession, in spite of the fact that the plaintiff is not seeking class certification.

Tolling Runs from Discovery of Error on FCRA Claim – Identity Theft

Andrews v. TRW, Inc., 225 F.3d 1063, 2000 U.S. App. LEXIS 16486, (9th Cir., July 17, 2000). In this identity theft case, Andrea Andrews used the birth date, social security number and driver's license number of Adelaide Andrews to apply for various forms of credit. Each of the creditors subscribed to TRW's credit reports. TRW issued credit reports of Adelaide Andrews to the creditors, and added the inquiries to the credit file. Nonetheless, three of the creditors declined the applications, and the fourth, a cable company, approved service. The account with the cable company later became delinquent and was referred for collection.

The plaintiff did not become aware of the imposter until some two years later, when she sought to refinance the mortgage on her home. The bank received a credit report from Chase Credit Research whose report combined information from TRW and two other credit reporting agencies. Plaintiff contacted TRW and requested deletion from her file of all references to the imposter's fraudulent activities, and TRW complied.

More than three years from the date of the identity theft, plaintiff filed suit claiming that TRW furnished the credit reports without "reasonable grounds for believing" that she was the consumer whom the credit applications involved, and as a consequence, she suffered damages and emotional distress. Her complaint also claimed that TRW had failed to maintain "reasonable procedures" required to "assure maximum possibly accuracy of information concerning the individual about whom the report relates. 15 U.S.C. § 1681e. The trial court determined that the two-year statute of limitations began to run at the time alleged wrongful disclosures were made to the creditors, and the court granted summary judgment in TRW's favor on the first claim.

With respect to the statute of limitations, 15 U.S.C. § 1681p reads "An action to enforce any liability created under this title may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this title, the action may be brought at any time within two years after discovery the in the individual of the misrepresentation." Based on this test, and the general federal rule that a federal statute of limitations begins to run when a party knows or has reason to know that she was injured, the court determined the plaintiff's suit to be timely filed.

On the question of whether TRW had a reasonable belief that the plaintiff was the consumer applying for credit, the court thought the random chance of anyone matching a name to a number to be very small – there are 250,000,000 persons in the United States, not all of them have a social security number, and 1,000,000 possibilities as to what any one social security number may be. "If TRW could assume that only such chance matching would occur, it would be reasonable as a matter of law in releasing the plaintiff's file when the application matched her last name and social security number." The court noted that we do not live in a world in which such matches are made only by chance. "In a world where names are disseminated with the numbers attached and dishonest persons exit, the matching of a name to a number is not a random matter." 225 F.3d 1063, 1067. The court reversed summary judgment. In March this year, the Supreme Court granted TRW's petition for writ of certiorari to the Ninth Circuit U.S. Court of Appeals. 121 S. Ct. 1223, 2001 U.S. LEXIS 1966.

Class Certifications

California Supreme Court Clarifies Analysis of Choice of Law Clauses in Consumer Contracts

Washington Mutual Bank, F.A. v. Superior Court, 24 Cal. 4th 906, 103 Cal. Rptr. 2d 320, 15 P.3d 1071, (2001). In this action, plaintiff sought nationwide class certification against American Savings Bank, F.A. ("ASB") (which was acquired by Washington Mutual), challenging ASB's forced placed property insurance program, *i.e.*, the insurance purchased by ASB when a borrower failed to maintain hazard insurance on the property securing his or her loan. Washington Mutual argued that a nationwide class action could not be certified because, pursuant to the choice-of-law provision in the borrower's form deeds of trust, the laws of the fifty states must apply. The choice-of-law provision provided that the agreement was "governed by federal law and the law of the jurisdiction in which the [secured property] is located." Notwithstanding the express choice-of-law provision, the trial court granted plaintiff's motion to certify a nationwide class and the Court of Appeal affirmed.

Reversing nationwide certification, the California Supreme Court addressed the following two issues presented by Washington Mutual: "First, what is the appropriate analysis for selecting applicable law in a class action where putative class members have contractually agreed to application of another state's law? Second, what analysis must be undertaken in the event litigation of the class action will necessitate application of the laws of multiple states?"

With respect to the first issue, the Court completely adopted Washington Mutual's position that, in determining whether common issues of law predominate for certification of a nationwide class based on claims involving an underlying contractual choice-of-law provision, a trial court "must apply the analysis set forth in [*Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459 (1992)], to evaluate disputed claims that class causes of action are subject to enforceable choice-of-law agreements" (emphasis added.) The *Nedlloyd* analysis involves two steps. First, the court should determine either: "(1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law." *Nedlloyd*, 3 Cal. 4th 466. Second, if either test is met, "the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law." *Id.* If there is a conflict of fundamental public policy, the court weighs the interests of the two competing states in order to determine the

applicable law. *Id.* Although *Nedlloyd* involved a contract negotiated between two sophisticated parties, the Supreme Court in *Washington Mutual* expressly rejected the argument that the *Nedlloyd* analysis is not applicable to form consumer contracts, finding that the *Nedlloyd* analysis "is properly applied in the context of consumer adhesion contracts." The Court also specifically rejected the "Court of Appeal's suggestion that California businesses dealing with mass groups of consumers should not be permitted to rely on choice-of-law clauses as a means of avoiding involvement in a nationwide class action." In this regard, the Court recognized that, "an otherwise enforceable choice-of-law agreement may not be disregarded merely because it may hinder the prosecution of a multistate or nationwide class action or result in the exclusion of nonresident consumers from a California-based action."

With respect to the second issue – what analysis should be undertaken where multiple states' laws will apply in a class action – the Supreme Court confirmed that the burden rests squarely with the proponent of class certification to demonstrate, "through a thorough analysis of the applicable state laws, that state law variations will not swamp common issues and defeat predominance." The Court explained that "the proponent's presentation must be sufficient to permit that the trial court, at the time of certification, to make a detailed assessment of how any state law differences could be managed fairly and efficiently at trial, for example, through the creation of a manageable number of subclasses," and that the trial courts "cannot accept 'en faith' an assertion that variation in state laws relevant to the case do not exist or are insignificant; rather, the party seeking certification must affirmatively demonstrate the accuracy of the assertion." Further, the Court soundly rejected plaintiff's argument that "a defendant should not be able to defeat nationwide class certification without affirmatively showing the existence of outcome-determinative differences among applicable state laws." To this end, the Court emphasized that "certification of a nationwide class is not a matter of right but is contingent upon a showing that all prerequisites for a class action are met."

Addressing issues raised by *amici curiae*, the Court also considered the proper analysis to be applied when no choice-of-law provision is provided, or if the choice-of-law provision relied upon is not applicable or enforceable. The Court concluded that the burden is on the party invoking the application of foreign law (which typically is the defendant in a nationwide class action) to demonstrate that other states' laws should apply to satisfying the requisite elements of the "governmental interest" test.

The Supreme Court opinion should have a significant impact on the certification of nationwide class actions throughout California. In the words of the Court, the Opinion provides "an analytical framework for evaluating the basic choice-of-law and conflict of laws issues that must be resolved when certification of a nationwide or multistate class action is sought." Under *Nedlloyd*, a choice-of-law clause stating that the parties' agreement is "governed by" the law of a certain state was held to have broad application. See *Nedlloyd*, 3 Cal. 4th at 470 (holding that "a valid choice-of-law clause, which provides that a specified body of law 'governs' the 'agreement' between the parties, encompasses all clauses of action arising from or related to the agreement, regardless of how they are characterized").

America Online, Inc., v. The Superior Court of Alameda County, 90 Cal. App. 4th 1, 108 Cal. Rptr. 2d 699 (2001). In this class action case filed in Alameda County, California, plaintiffs allege that America Online ("AOL") continued to debit internet service subscribers' credit cards for the monthly service fees (between $5 and $22) after subscribers terminated the service, in

violation of the California Consumer Legal Remedies Act ("CLRA"), the Unfair Business Practices Act, and common law claims, and ask for compensatory and punitive damages, injunctive relief and restitution.

A petition for writ of mandate was filed by AOL following the denial of its motion to stay or dismiss the case on the basis that California is an inconvenient forum in which to litigate the dispute. The AOL internet service provider contract with subscribers contained a forum selection clause, designating Virginia as the jurisdiction in which disputes must be litigated. First, the California Legal Remedies Act (upon which plaintiffs base their claims) contains a provision that voids any purported waiver of rights under the CLRA as contrary to public policy. Enforcement of the forum selection and choice of law clauses in the subscriber contracts would be "the functional equivalent of a contractual waiver of the consumer protections under the CLRA and, thus, is prohibited." *Id.* at 2.

Second, Virginia law does not allow consumer lawsuits to be brought as class actions, and the available remedies are more limited than those afforded by California law, in which case rights of California consumers would be substantially diminished if they would be required to litigate in Virginia. As a consequence, California's consumer protections would be undermined. The court's decision rendered the forum selection clause unenforceable.

Ambiguous Contract Language Precludes Class Certification

Mann v. GTE Mobilnet of Birmingham Inc., 730 So. 2d 150 (Ala. 1999). The Alabama Supreme Court affirmed the lower court's denial of class certification, holding that certification was improper where the contractual language at issue was ambiguous since the meaning ascribed by each class member required an individual factual inquiry that defeated commonality. Asserting claims for fraud and breach of contract, plaintiff contended that defendant failed to disclose the billing practice of "rounding up" to the nearest minute based on alleged differences among defendant's service agreements, which uniformly provided for "per minute" billing, and its advertisements, which varied in their statements. The court found that the claimed disparity between the service agreements and the advertisements precluded plaintiff from satisfying the commonality requirement because the evidence necessary to resolve those questions of fact -- the meaning each class member ascribed to the ambiguous term -- would vary. The court noted that, "if the [service] agreements are ambiguous, . . . the court would have to question every putative class member about his or her understanding of the meaning of the term 'per minute' to decide whether that customer's contract was breached." Additionally, there was evidence that the monthly bills each class member received reflected charges based on full-minute increments, which raised the question of whether potential class members were put on notice of the "rounding-up" practice. Finally, the court noted that reliance inquiries were also individualized and could not be decided on a class-wide basis.

Class Certification Should Not Be Based on an Evaluation of the Merits of the Claims At Issue

Thrifty Oil Co. v. Superior Court, 2001 Cal. App. LEXIS 667 (Aug. 24, 2001). In this latest proceeding, the California Court of Appeal granted Thrifty Oil Co.'s motion for summary judgment. The plaintiffs failed to meet their burden to produce some reasonably reliable evidence that defendant Thrifty Oil Co. imposed an illegal "surcharge" for charging one price to credit card purchasers, and a different price to cash purchasers. Some history is in order. In *Linder v. Thrifty*

Oil Co., 23 Cal. 4th 429, 97 Cal. Rptr. 2d 179, 2 P.3d 27 (2000), plaintiffs alleged a "surcharge class" challenging defendant's practice of giving a 4-cent per gallon cash discount for gas purchases. Plaintiffs contended that the cash discount resulted in a surcharge for credit card users that allegedly violated California's Song-Beverly Credit Card Act. Plaintiffs also sought to certify a "penalty class" based on allegations that defendant's service stations impermissibly used credit card forms with a preprinted space for cardholders to fill in their phone numbers. With respect to the surcharge class, the trial court found that a notice of the alleged surcharge posted at service stations meant that customers were free to chose whether to accept the charge and, thus, plaintiffs could not establish the requisite "community of interest" for class certification as a matter of law. Reversing the trial court, the Supreme Court adopted the federal courts' position under Rule 23 that inquiries into the merits of plaintiff's claims are not permissible in determining whether a class should be certified, stating that "we view the question of certification as essentially a procedural one that does not ask whether an action is legally or factually meritorious." The court noted that challenges to the merits of a class action claim should be made by pretrial motion.

Class Certification Decisions Involving "Moot" Claims

Wiskur v. Short Term Loans, LLC, 94 F. Supp. 2d 937 (N.D. Ill. 2000). The plaintiff brought a class action, alleging TILA and state law violations arising from "payday loans." Before plaintiff moved to certify a class, defendant submitted an offer of judgment pursuant to Federal Rule of Civil Procedure 68 that offered greater relief than plaintiff would have been entitled to had she successfully prosecuted her TILA claim. Defendant then moved to dismiss the case, claiming plaintiff's TILA claim was moot, and that consequently the court lacked subject matter jurisdiction over the supplemental state claims. The court granted defendant's motion, stating that "[a]n offer of settlement (or judgment) greater than the named plaintiff's claim that comes before a motion for class certification is the equivalent of a default judgment against the defendant, and eliminates the legal dispute upon which federal jurisdiction can be based." Because the Rule 68 offer came before a motion for class certification and was for an amount greater than plaintiff could have received, the court held that the TILA claim was moot once the offer was made. The court then dismissed plaintiff's other state law claims for lack of federal subject matter jurisdiction.

Wilner v. OSI Collection Services, Inc., 198 F.R.D. 393 (S.D.N.Y. 2001). The plaintiff brought a class action alleging that defendant's debt collection letter violated the FDCPA, pursuant to which plaintiff was entitled to actual damages, statutory damages up to $1,000, costs and attorneys' fees. Defendant made a Rule 68 offer of judgment while the court's ruling on the motion to certify the class was pending and, thus, the class had not yet been certified. Defendant offered to settle plaintiff's claims for more than he would have received from a favorable judgment. Based on the Rule 68 offer, the court dismissed the action for lack of subject matter jurisdiction. Additionally, the court rejected plaintiff's argument that a Rule 68 offer of judgment does not apply in a class action context where defendant has not offered to compensate the class because no class had been certified. The court also denied class certification for lack of evidence establishing numerosity.

Hayman v. Autohaus on Edens, Inc., 734 N.E. 2d 1012 (Ill. Ct. App. 2000), appeal denied, 192 Ill. 2d 688 (2000). A car purchaser asserted class claims against the dealership for fraud and violations of the state's consumer protection statute arising from the dealership's charge of a $299 service fee that allegedly was not disclosed at consummation of the lease transaction. Before the suit was filed, the dealership had offered to refund the full amount plaintiff demanded,

but plaintiff rejected the offer. The court held that, regardless of whether plaintiff rejected the offer, the dealership's tender of the full amount was neither a settlement nor compromise, but rather a refund that rendered plaintiff's damages claims moot. In so holding, the court noted that plaintiff was the only named member of the putative class and no motion for class certification had been made; thus, plaintiff could not be a member of the putative class.

Woodward v. Online Information Services, 191 F.R.D. 502 (E.D.N.C. 2000). The court certified a class action notwithstanding defendant's contention that plaintiff's individual claims were moot. Plaintiff alleged that defendant violated the FDCPA by using language in its collection letters that "overshadowed" FDCPA-required notices. Plaintiff claimed only statutory damages, which entitled him individually to a maximum $1,000 statutory penalty plus costs and attorneys' fees. Before plaintiff moved for class certification, defendant served an offer of judgment for $1,000 plus costs and attorneys' fees. Notwithstanding this offer, the court granted class certification. In this regard, the court stated that it "cannot dismiss a potential class action claim based on Defendant's offer to settle the individual claim of the named plaintiff."

DeMando v. Morris, 206 F.3d 1300 (9th Cir. 2000). The plaintiff claimed defendant violated TILA and various California state consumer laws by promising a "lifetime APR" of 10.9% on a credit card and subsequently notifying her that the interest rate would be raised to 14.9% pursuant to a change-in-terms clause in the cardholder agreement. Upon receiving notice of a change in rate, plaintiff promptly protested and ultimately filed the lawsuit. The day after plaintiff filed suit, defendant advised plaintiff that it was voluntarily rescinding the interest rate increase. Defendant then filed a motion to dismiss or, in the alternative, for summary judgment. In response, plaintiff moved for summary judgment and for class certification. The trial court granted defendant's summary judgment motion and dismissed plaintiff's motion for class certification as moot. On appeal, the Ninth Circuit affirmed summary judgment on plaintiff's state law claims because the intended rate increase was not effectuated. As to her TILA claim, however, the court reversed, reasoning that plaintiff could proceed to challenge whether the change-in-terms notice violated TILA. On the same grounds, the court also reversed the trial court's denial of the class certification motion.

Class Certification Decisions Addressing the Reliance Requirement for Actual Damages Under TILA

Perrone v. General Motors Acceptance Corp., 232 F.3d 433 (5th Cir. 2000), petition for cert. filed, No. 00-1251 (Jan. 31, 2001). The Fifth Circuit held that a class could not be certified when seeking actual damages under TILA and the Consumer Leasing Act (the "CLA"), because individual reliance must be shown by each putative class member. Plaintiffs sought actual and statutory damages and attorneys' fees against defendant for its alleged failure to itemize an "acquisition fee" in lease agreements. Plaintiffs had signed pre-printed form vehicle lease agreements with automobile dealerships that were subsequently assigned to defendant. Following Eighth Circuit law, the court held that the each member of the putative class must show detrimental reliance to seek actual damages and, therefore, denied class certification. See Peters v. Lupient Oldsmobile Co., 220 F.3d 915 (8th Cir. 2000).

Turner v. Beneficial Corp., 242 F.3d 1023 (11th Cir. 2001). The Eleventh Circuit, sitting en banc, vacated an earlier decision by an Eleventh Circuit three-judge panel that had held detrimental reliance need not be individually shown by putative class members seeking actual

damages under TILA. *See Turner v. Beneficial Corp.*, 236 F.3d 643 (11th Cir. 2000). The Eleventh Circuit panel had reversed the district court's denial of class certification based on the conclusion that individual detrimental reliance must be shown for actual damages claims, noting reluctantly that it was bound by the precedent established by another panel of the Eleventh Circuit. Overruling prior precedent and affirming the district court's denial of class certification, the en banc court joined the Fifth, Sixth and Eighth Circuits in holding that detrimental reliance must be established for actual damages under TILA by each putative class member, precluding class certification under Rule 23(b)(3).

Nationwide Class Treatment Not "Superior" Adjudication Method Due to Statutory Damages Cap

Brink v. First Credit Resources, 185 F.R.D. 567 (D. Ariz. 1999). Plaintiffs challenged defendant's mailing of a "pre-approved" credit card with a set credit limit and outstanding debt in the exact amount the consumer previously owed, but the collection of which was time-barred by the statute of limitations. Plaintiffs claimed the mailing deceived consumers into reaffirming time-barred debts, in violation of the FDCPA. The court certified a class consisting of Arizona residents, rather than a nationwide class, reasoning that the FDCPA's $500,000 statutory damages cap, or 1% of the defendant's net worth, divided among a nationwide class with 231,000 putative class members would not be a superior method for adjudicating the suit. The court noted that it was an open question in the Ninth Circuit whether the statutory damages cap applied to each class action brought for the same conduct or applied instead to an aggregate group of class actions pertaining to the same misconduct. Looking to Seventh Circuit dicta in *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997), the court held that "it would be a disservice to the potential plaintiffs [to certify a nationwide class] because the group as a whole might obtain a larger total recovery by maintaining several class actions rather than only one."

Arbitration Clauses In Consumer Contracts

The Enforceability of Arbitration Clauses in Consumer Class Actions

The enforceability of arbitration provisions in consumer agreements has become a particularly important issue because numerous federal courts have held that, pursuant to the Federal Arbitration Act (the "FAA"), unless the arbitration agreement explicitly authorizes class treatment, arbitration may not proceed on a class basis. *See, e.g., Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995). To this end, consumer-oriented businesses across the nation, including numerous financial services companies, have utilized arbitration provisions in their respective customer agreements to preclude the potential for class recovery. Although this argument has been unsuccessful in California (*see, e.g., Blue Cross of Cal. v. Superior Court*, 67 Cal. App. 4th 42, 78 Cal. Rptr. 2d 779 (1998), *review denied*, (1999), *cert. denied*, 527 U.S. 1003, 119 S. Ct. 2338, 144 L. Ed. 2d 235 (1999) (holding that the FAA does not preclude classwide arbitration)), it remains a critical issue for lawsuits outside California.

Green Tree Financial Corp. v. Randolph, 121 S. Ct. 513 (2000), addressed whether an arbitration clause in a consumer lending agreement, which was silent with respect to the allocation of arbitration costs, was unenforceable because it allegedly failed to protect the consumer from potentially steep arbitration expenses. Enforcement of the arbitration provision would also preclude plaintiff from asserting a class action.

In *Green Tree*, plaintiff financed the purchase of a mobile home through defendants pursuant to a finance/security agreement that required plaintiff to purchase vendor's single interest insurance, which protects the vendor or lienholder against the costs of repossession in the event of default. Plaintiff sued defendants for allegedly violating TILA by failing to disclose the vendor's single interest insurance as a finance charge. Rejecting plaintiff's argument that she lacked the resources to arbitrate, the trial court granted defendants' motion to compel arbitration and dismissed plaintiff's claims with prejudice. The Eleventh Circuit reversed, reasoning that the arbitration agreement was unenforceable because it was silent as to the allocation of arbitration costs and, therefore, failed to provide the minimum guarantee that plaintiff could vindicate her statutory rights under TILA; i.e., plaintiff's ability to vindicate her statutory rights would be undone by potentially "steep" arbitration costs. The Supreme Court reversed the Eleventh Circuit's decision in this regard and found the arbitration provision enforceable. The Court rejected plaintiff's contention that the arbitration agreement's silence with respect to costs posed a "risk" that she would be required to bear prohibitive costs and therefore be unable to vindicate her statutory rights. The Court declined to address plaintiff's alternative argument that the arbitration agreement was unenforceable because it precluded her from bringing class action claims under TILA, noting that this issue was not properly before the Court.

Cutler v. Orkin Exterminating Co., 770 So. 2d 67 (Ala. 2000). The Alabama Supreme Court held that a named plaintiff who did not have an arbitration agreement with the defendant cannot adequately represent absent class members who did have such agreements, and that the named plaintiff's claims in such circumstances were not sufficiently common or typical. Plaintiffs brought a class-action suit alleging that defendants failed properly to perform certain annual building inspections. The trial court certified a class consisting of defendants' past and present customers. Defendants subsequently moved to dismiss approximately 5,300 homeowners whose contracts with defendants contained an arbitration clause. The trial court granted defendants' motion, and plaintiffs appealed, arguing that the arbitration provisions in the absent classmembers' contracts were unenforceable on grounds of unconscionability. The Alabama Supreme Court affirmed the dismissal of the absent homeowners, holding that plaintiffs' representation of homeowners whose claims were subject to arbitration did not meet the certification requirements of commonality, typicality or adequacy of representation.

Goetsch v. Shell Oil Co., 197 F.R.D. 574 (W.D.N.C. 2000). The plaintiff brought a class action against Shell Oil Company and Associates National Bank, asserting numerous claims based on allegations that defendants: (1) failed to credit plaintiff's payments to his account in a timely manner; (2) failed to calculate interest rates properly; and (3) changed interest rates without prior notification. Defendants moved to compel arbitration, citing an arbitration provision added to plaintiff's account agreement by a change-in-terms notice. The arbitration provision, which expressly precluded class action arbitration, replaced a prior arbitration provision that was added by Associates National Bank when it acquired a portfolio of accounts from Shell Oil Company. Plaintiff claimed that he was never provided with notice of the second change in terms and that the second change in terms could not be applied retroactively to charges incurred prior to the effective date of the new arbitration provision. The court rejected plaintiff's arguments, finding that the notice of the change in terms clearly provided that Associates had "the right to change the terms of th[e] Agreement at any time" and that "the revised terms [applied] to all outstanding unpaid indebtedness . . . , as well as new transactions." Additionally, the court held that plaintiff's continued use of the credit card constituted acceptance of the new provision.

Johnson v. West Suburban Bank, 225 F.3d 366 (3rd Cir. 2000), *cert. denied*, 2001 WL 137649 (Feb. 20, 2001). The plaintiff entered into a short-term loan agreement, which he claimed violated both TILA and the Electronic Funds Transfer Act ("EFTA"). Defendant sought to compel arbitration of plaintiff's claims pursuant to an arbitration provision in the loan agreement, the effect of which would preclude plaintiff from asserting a class action. Plaintiff argued that arbitration could not be compelled because the provisions of TILA provide a statutory right to bring a class action, notwithstanding the arbitration clause. Reversing the district court's order denying defendant's motion to compel arbitration, the Third Circuit held that arbitration clauses "are effective even though they may render class actions to pursue statutory claims under the TILA or the EFTA unavailable." The court also noted that several district courts had similarly decided the issue. *See Thompson v. Ill. Title Loans, Inc.*, No. 99C 3952, 2000 WL 45493 (N.D. Ill. Jan. 11, 2000); *Stout v. Byrider*, 50 F. Supp. 2d 733 (N.D. Ohio 1999), *aff'd*, 228 F.3d 709 (6th Cir. 2000), *cert. denied*, No. 00-964, 2001 WL 137772 (Feb. 20, 2001).

Sagal v. First USA Bank, N.A., 69 F. Supp. 2d 627 (D. Del. 1999), *aff'd*, No. 99-5873, slip. op. at 1-3 (3d Cir. Jan. 18, 2001) (unpublished opinion). The plaintiff brought a class action asserting various causes of action, including the violation of TILA, based on allegations that defendant failed properly to disclose certain convenience check transaction fees in connection with a credit card account. Prior to plaintiff bringing suit, defendant mailed to its existing customers, including plaintiff, an amendment to the cardholder agreement that added an arbitration clause. Defendant moved to dismiss or stay plaintiff's claims based on the arbitration clause. In opposition, plaintiff argued that arbitration was fundamentally inconsistent with, and frustrated the purposes of, TILA since TILA expressly provides for class action suits. Rejecting plaintiff's argument, the court granted the motion and dismissed all of plaintiff's claims pursuant to the arbitration clause. The court reasoned that, "[b]ecause Congress has not provided for a statutory right to pursue class actions under the TILA, and because there are alternative means to bring suit thereunder, this court does not find that the TILA amounts to a 'congressional command' to preserve class action suits at the expense of the FAA."

Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. Ct. App. 1999). The court refused to enforce an arbitration provision that was added to customers' cellular telephone agreements by way of a "bill stuffer." Denying defendant's motion to compel arbitration, the court held that the bill stuffer amendment was unconscionable and unenforceable because: (1) it failed to give adequate notice of the change in terms; and (2) it impermissibly limited plaintiffs' statutory remedies, including punitive damages, injunctive relief, and the ability to bring a class action suit. Finally, the court noted that, even if the arbitration provision was enforceable, it could not be retroactively applied to plaintiffs' claims in the existing lawsuit, which was initiated prior to the mailing of the bill stuffer amendment.

Residential Mortgage Lending Cases and Related Issues

Culpepper III - Eleventh Circuit Affirms Yield Spread Premium Test

Culpepper v. Irwin Mortgage Corporation, f.k.a. Inland Mortgage Corporation, 253 F.3d 1324 (11th Cir. 2001). In this mortgage broker "yield spread premium" case, a class of all persons who obtained an FHA mortgage loan funded by Irwin Mortgage Corporation from April 1995 to June 1999, wherein the broker was paid a loan origination fee of 1% or more and a yield

spread premium, had been previously certified. Each business day Irwin distributes a rate sheet to its brokers, listing the terms and rates of the loans Irwin is offering that day, making reference to a "par rate." If the broker originates a loan at an above-par rate, the broker receives a yield spread premium according to a formula that includes the amount of the loan and the difference between the loan rate and the par rate. The formula did not take into account the amount of work the broker actually performed in originating the loan or how much the borrower paid in fees for the broker's services.

This appeal focuses on whether questions of law or fact common to the members of the class predominate over questions affecting only individual members, and whether transaction-specific evidence is necessary or relevant for purposes of this determination. In order to reach the answer, the court must examine the rule of liability.

First, Section 8(a) of the Real Estate Settlement Procedures Act (RESPA) prohibits both the giving and acceptance of "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service . . . shall be referred to any person." 12 U.S.C. § 2607(a). Giving and acceptance of a fee for referral of a mortgage loan to a lender is thus prohibited. However, Section 8(c) qualifies this blanket prohibition by sheltering from liability "the payment of a fee . . . by a lender to its duly appointed agent for services actually performed in the making of a loan." 12 U.S.C. § 2607(c)(1)(C). In *Culpepper I*, 132 F.3d 692 (11th Cir. 1998), the panel prescribed a three-part test for prohibited payments: A payment is prohibited if (1) a payment of a thing of value is (2) make pursuant to an agreement to refer settlement business, and (3) a referral actually occurs. *Id.* at 696.

Following *Culpepper I*, HUD issued a policy statement that yield spread premiums are not illegal per se, but can nonetheless be illegal according to a two-step analysis: (1) whether goods or facilities were actually furnished or services were actually performed for the compensation paid, and (2) whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed. 64 Fed. Reg. 10080, 10084 (March 1, 1999). According to Irwin, the HUD policy statement would override *Culpepper I's* interpretation of § 8(c) by providing a two-step reasonableness test: (1) whether any services were performed by the broker and (2) whether the yield spread premium and the fees the borrower pays the broker add up to reasonable compensation for the broker's work. The loan-by-loan review that Irwin would want is based on the premise that any payment Irwin makes to a broker is all right, as long as the payment, whatever its reason, would have been reasonable compensation for services, had it been compensation for services. Thus, each loan transaction would have to be reviewed to determine the amount of work done by the broker – investigation, paperwork, counseling, etc.

In giving its opinion, the court interprets the HUD policy statement to conform to its views in *Culpepper I*. That is, the first step of the HUD policy statement requires a determination that the broker performed services as part of a services-for-money exchange, "for compensation paid." This means § 8(c) is not read as a "gloss" on § 8(a), which makes compensation for referrals illegal. As a consequence, if the fees paid fail to pass muster under § 8(a), they never undergo analysis under § 8(c), to determine whether they are reasonable. Also, the nature of the yield spread premium is determined by examining the intent of the broker and the borrower. This examination does not need to be conducted on a loan-by-loan basis where standardized terms under which the lender pays the premiums to the broker can prove that the premiums are fees for referrals. For these reasons, class treatment under Fed. R. Civ. P. 23(b)(3) is appropriate.

Beneficiary Must Act "Immediately" Upon "Satisfaction" Of Loan Under California Civil Code Section 2941

Bartold v. Glendale Federal Bank, 81 Cal. App. 4th 816, 97 Cal. Rptr. 2d 226, rev. denied, (2000). In this action, plaintiffs claimed that defendants, the beneficiary and trustee under deeds of trust securing California loans, failed timely to reconvey interests in real property upon satisfaction. Plaintiffs alleged violations of California Civil Code Section 2941 and California Business and Professions Code Section 17200, et seq., breach of contract, fraud and unjust enrichment. Among other things, the trial court granted defendants' motion for summary judgment on the cause of action for violation of Section 2941 as to the beneficiary. Plaintiffs appealed. The Court of Appeal reversed the order, finding that, under Section 2941, a beneficiary must forward the original note, deed of trust and request for full reconveyance to the trustee "immediately" upon satisfaction. Prior cases had indicated that the beneficiary must act within a "reasonable" time, sometimes described as 60 days. On remand, numerous issues remain to be litigated, including the meaning of "satisfaction" -- i.e., does satisfaction occur when a beneficiary simply receives a payoff check or when the check clears -- and whether a reasonableness standard is implied into the term "immediately."

Lawless v. First Nationwide Bank, Hon. S. R. Pollak's Order on Cross-Motions for Summary Judgment (S.F. County Superior Ct. Case No. 972812, December 8, 2000). In a recent order of the San Francisco Superior Court with respect to various issues regarding reconveyance claims, the Court concluded that: (1) the beneficiary in that case complied with Civil Code Section 2941(b)(1) by each day inputting into its computer system information regarding loans paid off that day and transmitting the list electronically to the trustee; (2) "no particular formalities are necessary to create a request for reconveyance" by the beneficiary under Section 2941; (3) there may be liability by the beneficiary under Section 2941(b)(1) based on the failure to deliver to the trustee of record a request to reconvey when the beneficiary's practice upon loan payoff is to execute a "substitution of trustee/full reconveyance" substituting a new trustee for the trustee of record; (4) the exception under Section 2941(c)(1) to a trustee's obligation to record or cause to be recorded reconveyances is not satisfied by sending unrecorded reconveyances to an escrow or title company after escrow already has closed; (5) for the purpose of determining the applicable statute of limitations under Section 2941, as construed by the Court in *Prudential*, borrowers are entitled to expect that the beneficiary and trustee will perform their legal obligations and borrowers are under no duty to investigate the status of their reconveyances; and (6) once escrow is closed, knowledge obtained by the borrower's escrow or title company cannot be imputed to the borrower.

TILA Claim Barred by Res Judicata

Albano v. Norwest Financial Hawaii, Inc., 244 F.3d 1061 (9th Cir. 2001). The Albanos' 1994 home mortgage loan on their residence was refinanced by Norwest, and in 1996 judicial foreclosure proceedings were commenced. The Albanos failed to appear, and foreclosure judgment was entered against them. The January 1997 judgment declared that the mortgage was valid, that it was foreclosed, and that the Albanos were "perpetually barred of and from any and all right, title and interest in the mortgaged property." No appeal was taken.

In March 1997, the Albanos attempted to rescind the 1994 loan on the basis that Norwest had not complied with TILA. The U. S. District Court ultimately determined that the

Albanos could not maintain the action because they had not raised their TILA claim in the state foreclosure proceedings, although they could have done so. Thus, said the court, the action was barred by the principle of *res judicata*.

Loan Fees Exceed FHA Authorized Amount – Class Certified

Bjustrom v. Trust One Mortgage Corp., 199 F.R.D. 346 (W.D. Wa. 2001). Earlier this year the U. S. District Court for the Western District of Washington certified a class of approximately 12,000 FHA mortgagors located primarily in California, Oregon, Nevada and Washington whose loans from Trust One Mortgage Corp. allegedly incurred aggregate fees charged and collected for originating and processing the loan in excess 1% of the aggregate loan amount. The Court also certified a subclass of approximately 6,000 – 10,000 of these borrowers where the loan was funded by a mortgage broker or loan correspondent and where the yield spread premium, service release premium and/or lender paid broker fee was paid by Trust One to the broker or loan correspondent, and where the aggregate of all fees exceeded 1% of the loan amount. The common question of law involves whether the lender may circumvent the FHA 1% fee limitation by paying its brokers extra money and recouping it by inflating the interest rate on the loan.

RESPA Violation Found For An Unorthodox "Split" Fee

Christakos v. Intercounty Title Co., 196 F.R.D. 496 (N.D. Ill. 2000). Plaintiff filed a class action against a title company, alleging that, while acting as the settlement agent in the refinancing of her home, defendant violated RESPA by charging a fee for recording a release that it did not actually record. At closing, defendant provided plaintiff with a HUD-1 Settlement Statement which included a charge of $29.00 for "Releases." The release, however, was recorded by Mellon Mortgage Company ("Mellon"), the prior lender who held the mortgage on plaintiff's property. Mellon subsequently assessed a recording fee of $23.50 to plaintiff, as disclosed on the payoff statement. Defendant argued that Section 2607(b) was not implicated because it did not "split" the $29.00 fee with a third party. The court rejected defendant's argument and held that plaintiff adequately alleged a RESPA violation. In so doing, the court determined that, although there technically was no "split" of a fee (Mellon was an "unwitting" party who actually earned the fee it charged), the language and regulations of RESPA were sufficiently broad to cover situations where a borrower, like plaintiff, paid two amounts to two separate parties for the same service.

Settlement Services At Lower Prices Based On Economies Of Scale Do Not Constitute RESPA Violation

Lane v. Residential Funding Corp., 2000 WL 1448582 (N.D. Cal. 2000). Defendants Residential Funding Corporation and First National Bank of Chicago (together, "RFC"), large-volume institutional sellers of real estate, and defendant Chicago Title Company ("Chicago"), a provider of settlement services, including escrow and title insurance services, moved for summary adjudication of plaintiff's RESPA claim. RFC and Chicago negotiated a deal by which Chicago would charge RFC a "flat" or uniform fee of $300 for basic services and 60% of the basic rate for

an owner's title insurance policy. Plaintiff, who purchased a home from RFC, alleged that the above-described agreement violated RESPA's prohibition against referral fees.

In support of their motion for summary adjudication, defendants argued that the discount given was neither in exchange for referrals nor dependent on volume of business, but rather was predicated on lower transaction costs associated with providing settlement services to a sophisticated institutional seller such as RFC. In particular, defendants offered uncontested evidence that Chicago's costs for providing escrow services to RFC were lower than the cost for providing the same services to individual sellers because of "RFC's familiarity with and knowledge of escrow transactions and its use of standardized forms and procedures." Moreover, because properties sold by RFC involved recent foreclosures with attendant title reports or trustee sale guarantees, the cost of title searches at time of resale also were reduced. Based on this evidence, the court granted defendants' motion for summary adjudication, finding that, "where fees charged for escrow and related settlement services are based on economies of scale or other recognized economic principles, the amount of any discount afforded the seller should not be considered a fee for referring the buyer."

Must Plead Existence Of Actual Damages To State RESPA Claim

Stevens v. Citigroup, Inc., 2000 WL 1848593 (E.D. Pa. 2000). Plaintiff asserted class claims on behalf of "all of defendants' mortgagors who [had] been charged forced order insurance premiums in the United States during the six years preceding [filing], and who [had] not received a full refund." Plaintiff alleged that defendants coerced class members into making forced order insurance payments. The court granted defendant Citigroup's motion to dismiss the RESPA claim without leave to amend on the grounds that plaintiff failed to plead the existence of actual damages directly attributable to Citigroup's supposed violation of the statute. As to the remaining claims (e.g., breach of contract and unfair business practices), the court denied the motion, finding that plaintiff challenged the way in which the defendants chose the insurance at issue, not the excessiveness of any one insurance rate, and, thus, the filed-rate doctrine did not apply.

Fax And Quote Fees Do Not Constitute Prepayment Penalties

Jerik v. Columbia National, Inc., 1999 WL 1267702 (N.D. Ill. 1999). Plaintiff asserted class claims, arguing that quote and fax fees for payoff statements were prepayment penalties expressly forbidden by the note. Plaintiff hired Stephen Newland ("Newland"), an attorney, to represent his interests in selling his home. Newland sent defendant a letter requesting payoff information on plaintiff's loan. Plaintiff was assessed a $10.00 quote fee and a $5.00 fax fee, which he paid under protest.

The court, relying on *Goldman v. First Fed. Sav. & Loan Ass'n*, 518 F.2d 1247 (7th Cir. 1975), held that the disputed fees did not constitute prepayment penalties merely because plaintiff incurred them while in the process of prepaying his loan. Rather, to constitute a prepayment penalty, a charge must be imposed if a loan is prepaid, but not imposed if paid at maturity. Since defendant's practice of assessing the quote and fax fees was not predicated solely upon prepayment, the court rejected plaintiff's argument. The court also rejected plaintiff's assertion that defendant breached the contract by assessing the fax and quote fees, which were not specifically authorized by the mortgage and note.

Krause v. GE Capital Mortgage Service, Inc., 731 N.E.2d 302 (Ill. App. Ct. 2000). Plaintiffs asserted claims for breach of contact, restitution and unfair and deceptive business practices, challenging defendant's assessment of a $15.00 quote fee for a second payoff statement and a $10.00 fax fee for transmitting that statement as unauthorized prepayment penalties. The court found that the disputed charges were not particularly associated with prepayments; they were service fees that could be assessed in various situations. The court also found that defendant did not engage in unfair business practices because the disputed fees accurately were disclosed to plaintiffs.

Auto Finance and Leasing Cases

Dealer and Finance Source Sharing Finance Charge Not Unlawful

Geller v. Onyx Acceptance Corp., Hon. Charles R. Hayes' Tentative Decision on Matter Under Submission, Findings of Fact, and Conclusions of Law (S.D. County Superior Ct. Case No. 728614, August 9, 2001), brought a welcome breath of the fresh air of reality to the automobile finance charge participation cases. Plaintiffs in this class action case alleged that Onyx Acceptance Corp., who purchased motor vehicle retail installment contracts from motor vehicle dealers, engaged in unlawful, unfair and fraudulent business practices by paying "secret rebates or kickbacks to auto dealers contrary to the provisions of the Rees-Levering Act, Civil Code § 2982.5(d) and Business and Professions Code §§ 17200 and 17045." The court engaged in a fine analysis of the indirect financing business, including the practice of the finance company purchasing the paper at a "buy rate" and sharing the finance charge between the buy rate and the contract rate with the dealer as part of the dealer's compensation, and the market forces at play that keep the contract rate at reasonable levels, and held that these practices are not unfair, unlawful, fraudulent or deceptive within the meaning of the Rees-Levering Act or the applicable provisions of the Business & Professions Code.

"Optional" Credit Insurance Disclosure in Retail Installment Contract

London v. Chase Manhattan Bank USA, N.A., 2001 U.S. Dist. LEXIS 6888 (S.D. Fla. Mar. 30, 2001). Roger London applied for a credit card offered by Chase Manhattan Bank, N.A. through Wal-Mart, an arrangement referred to as a "co-branded credit card." In the process, the applicant initialed a line on the application indicating that he wanted to purchase "LifePlus," a package of life, disability, involuntary unemployment and leave of absence insurance coverages. The application referred to the insurance coverages as "optional." London brought a class action Truth in Lending Act claim against Chase asserting that Chase's characterization of the coverages as "optional" was insufficient under TILA to avoid having the cost of the coverages treated as a finance charge. When Chase moved for partial summary judgment, the U.S. District Court for the Southern District of Florida rejected London's argument that the credit insurance disclosures were required to parrot the language of the Act or the Regulation. The court concluded that the mere use of "optional" without more, was insufficient under TILA to exclude the charges from the finance charge. The court concluded that it was "clear that a reasonable applicant could understand" that while the applicant was not required to obtain credit, Chase nevertheless could choose to consider the applicant's decision to enroll or not enroll in the insurance program in its decision to approve the application for a credit card.

Consumer Leasing Act – Reg. M/Leasing

Clement v. American Honda Finance Corp., 145 F. Supp. 2d 206 (D. Conn. 2001). The opinion of the Court in this case deals with "old" (the 1992 version) Regulation M. (Regulation M, 12 CFR 213, was effective October 31, 1996, compliance optional until January 1, 1998). Jean Clement sued American Honda Finance Corp., asserting that the early termination provisions in her lease failed to comply with the Consumer Leasing Act and old Regulation M requirements that early termination penalties be disclosed in a "clear and conspicuous" manner. Clement moved for summary judgment, which the court granted, placing heavy reliance on the Second Circuit's opinion in *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11 (2d Cir. 1993).

Rather than follow the standard set for disclosures of early termination liability in the 7th Circuit (*citing Channell v. Citicorp Nat' Serv., Inc.*, 89 F.3d 379, 383 (7th Cir. 1996)), the Court was bound to follow the standard set forth in *Lundquist*, 993 F.2d at 15. That standard is based on an interpretation of the fact that termination disclosures must "be reasonably understandable" – interpreting the requirements of the Consumer Leasing Act and Regulation M that disclosures be made "accurately and in a clear and conspicuous manner," 15 U.S.C. § 1667a, "in meaningful sequence," 12 C.F.R. § 213.4(a)(1), and in "a reasonably understandable form," 12 C.F.R. pt. 213, supp. I, § 213.4(a)(1) (Official Staff Commentary). Finding that "too many concepts piled into a single paragraph" created a problem with understanding paragraph 10 in the lease, and as a result, the early termination disclosures failed the test. *See also Applebaum v. Nissan Motor Acceptance Corp.*, 1999 WL 23660 (E.D. Pa. 19099) *overruled on other grounds*, 226 F.3d214 (3rd Cir. 2000).

California Leasing Act "Single Document" Rule

Kroupa v. Sunrise Ford, 77 Cal. App. 4th 835, 92 Cal. Rptr. 2d 42 (1999). Under the California Vehicle Leasing Act, all agreements between lessees and lessor pertaining to vehicle lease were required to be included in single document, including arrangements regarding trade-ins, cash payments, and the lessor's assumption of negative equity. Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion was certified for publication with the exception of parts C. and D. of the discussion. The publication status of this document was changed by the Court from unpublished to partially published January 20, 2000. As Modified January 20, 2000; review denied March 15, 2000, reported at: 2000 Cal. LEXIS 1894.

More recently, the "chickens have come home to roost" in *Trygar v. HAK, Inc., dba Keyes European*, Los Angeles County Superior Court Case BC236185, filed September 1, 2000, involving the "payoff adjustment" form for the handling of arrangements for the trade-in vehicle in connection with a consumer motor vehicle lease. Plaintiffs allege the separate form documenting the lessee's representation that the payoff information furnished about the trade-in vehicle is correct is in violation of the "single document" rule of the Act, which provides that the lease must contain "in a single document all of the agreements of the lessor and lessee with respect to the obligations of each party."

Because the case has endless ramifications (the forms have been used extensively in California) a legislative effort to clarify the "single document rule" in the Act has been introduced in the California legislature, Senate Bill 281. If adopted, the new law will become effective January 1, 2002, and would require revisions to lease forms used in California.

Vehicle Spot Delivery – Rescission of Retail Installment Contracts

Burns v. Elmhurst Auto Mall, Inc., 2001 U.S. Dist. LEXIS 6385 (N.D. Ill. 2001). Charmira Burns sued Elmhurst Auto Mall, Inc. alleging violations of Illinois state law, the federal Truth in Lending Act and the Equal Credit Opportunity Act. Elmhurst repossessed a vehicle purchased by Burns because Elmhurst was unable to secure financing on behalf of Burns for the purchase. Elmhurst moved to dismiss the federal claims and the UCC claim based on the repossession. The Court dismissed the UCC claim because it found that Elmhurst was the owner of the vehicle and had a right to possess the vehicle after it properly cancelled Burns' contract for lack of financing. The court also dismissed the TILA claim because the contract disclosures were accurate when given. The court denied the motion to dismiss with respect to the ECOA claim because it was unclear who had provided the adverse action notices required under the ECOA and Regulation B.

In connection with her purchase of a Kia Sephia from Elmhurst, Burns signed a retail installment contact and a document titled "Consent Rider for Inability to Finance." The Rider allowed Elmhurst to unwind the deal if it was unable to obtain financing. The Rider did not, however, indicate that the dealership or any third party financing company must notify Burns of the inability to obtain financing within a specific number of days after consummation of the transaction. Elmhurst repossessed the vehicle sometime before the first payment was due. According to the court, Elmhurst never notified burns in writing that her financing application has been denied, nor did it inform her of the reasons her application was denied.

Evolving Theories

Court Allows Plaintiffs to Proceed on Equitable Recoupment as a Defense Theory in Alleged Predatory Lending Action

Associates Home Equity Services, Inc. v. Troup, 2001 N.J. Super. LEXIS 318 (July 25, 2001). One theory under equitable recoupment is that it may be used as an affirmative defense to a foreclosure action. A successful recoupment defense would reduce the amount the plaintiff can recover on the claim for the debt when the counterclaim arises from the same transaction. The theory of recoupment was initially developed to avoid unusually harsh or egregious results form a strict application of a statute of limitations. Here, the theory would help the defendants by providing additional time to conduct discovery in their claim that the lender and others engaged in predatory lending activities in their inner-city neighborhood in New Jersey that unfairly discriminated against them.

The defendants are African-Americans who obtained a mortgage loan from a mortgage company to pay for repairs to their Newark home made by a home improvement contractor. The note and mortgage were assigned to Associates Home Equity Services. When the Troups defaulted, Associates instituted foreclosure proceedings. The trial court granted summary judgment holding that the terms of the construction loan were not unconscionable and that the Troup's affirmative claims under applicable state and federal laws were barred by the governing statute of limitations. The Superior Court of New Jersey Appellate Division reversed in part, holding that it was premature to dismiss the claim that the lender had engaged in predatory lending activities, and that the Troups were entitled to discovery on this claim.

Catalyst Theory Supporting Recovery of Attorney's Fees Rejected by U.S. Supreme Court

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 121 S. Ct. 1835 (2001), the Supreme Court addressed whether a plaintiff can qualify as the "prevailing party" under federal statutes which allow for fee-shifting when the plaintiff fails to obtain a judgment on the merits or court-ordered consent decree, but nevertheless achieves the desire result because the lawsuit brought about a voluntary change in the defendant's conduct. Although most federal Courts of Appeal had allowed recovery of prevailing party attorneys' fees under such circumstances on the theory that the plaintiff had been a successful "catalyst," the Supreme Court rejected the catalyst theory based upon the "American Rule" that attorneys' fees generally are not awarded to a prevailing party absent explicit statutory authority as well as the dictionary definition of "prevailing party". Although not decided in a class action case, *Buckhannon* should undermine attempts by class or representative counsel to obtain fee awards in cases where the defendant changes its conduct voluntarily, and not pursuant to a court order requiring the conduct to change.

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